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# Justice Anthony M. Kennedy and the Doctrine of Stare Decisis

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## **Introduction**

Starting with our first email from Professor Wefing, the Fall 2014 U.S. Supreme Court class at Seton Hall University School of Law was posited the following: “Does the Court follow its own precedent? Is *stare decisis* really relevant or is it simply used to help justify a decision and rejected whenever the Court wants to reach a different result or the Court has changed and has different views?”<sup>1</sup> Admittedly, I put these questions to the side for some time, but I am elated to have the opportunity to revisit them. This Advanced Writing Requirement paper explores *stare decisis* and its role in U.S. Supreme Court decisions. But it also does more than have an academic discussion on a judicial doctrine of consistency. In particular, I explore Associate Justice Anthony M. Kennedy’s view of *stare decisis* in constitutional cases.

As a guide to the multitude of pages to follow, here is a brief outline of my paper: Part I discusses Justice Kennedy’s personal history, an intellectual life filled with a variety of experiences that likely shaped his middle-man position on the Court; Part II delves into the doctrine of *stare decisis*, and Justice Kennedy’s jurisprudential approach that evades many a scholar; Part III addresses particular case law, as crafted by Justice Kennedy, that best reveals his approach to the doctrine of *stare decisis*. In the end, I conclude that although Justice Kennedy attempts to follow a strong doctrine of *stare decisis*, he capitalizes on what I call “his exception” to *stare decisis* that allows him to escape the binding nature of *stare decisis*. Justice Kennedy’s stance on constitutional *stare decisis* not only adds to his very complex, confusing jurisprudence, but also allows him to substantially effect constitutional principles in controversial cases to come.

### **I. Personal History of Justice Kennedy**

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<sup>1</sup> Email from John Wefing, Distinguished Prof. of NJ Law and History, to U.S. Supreme Court class (Aug. 5, 2014, 15:34 EST) (on file with author).

Anthony McLeod Kennedy was born on July 23, 1936.<sup>2</sup> He grew up as the middle child of three children in the Kennedy household.<sup>3</sup> His upbringing in Sacramento, California is said to have shaped Justice Kennedy's "approach to life that suggests a small-town innocence."<sup>4</sup> His father, Anthony J. Kennedy, was a local attorney and lobbyist for different businesses to the California state legislature.<sup>5</sup> His mother, Gladys McLeod, was an active part of the Sacramento civic activity scene.<sup>6</sup>

Because of the active social role his father played in California politics, Justice Kennedy grew up with "a [household] rule that the table was to be set with a couple extra places each night for dinner because on any given night he [Justice Kennedy's father] might bring clients or friends home with him."<sup>7</sup> Yet, Justice Kennedy was not a particularly social child.<sup>8</sup> The scrawny, young Justice Kennedy spent most of his time running home after school to read books.<sup>9</sup> However, Justice Kennedy's quiet and introverted demeanor provided a unique opportunity to join the California legal and political scene. Justice Kennedy's father took him on trips to attend trials in Northern California and arranged a page-boy job for him at the California State Senate.<sup>10</sup> Justice

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<sup>2</sup> The Oyez Project at IIT Chicago-Kent College of Law, Anthony M. Kennedy, [http://www.oyez.com/justices/anthony\\_m\\_kennedy](http://www.oyez.com/justices/anthony_m_kennedy) (last visited Sept. 2, 2014); Anne Jelliff, Catholic Values, Human Dignity, and the Moral Law in the U.S. Supreme Court: Justice Anthony Kennedy's Approach to the Constitution, 76 Alb. L. Rev. 335, 337 (2013).

<sup>3</sup> The Oyez Project (citing Robert Reinhold, Restrained Pragmatist: Anthony M. Kennedy, N.Y. Times, Nov. 12, 1987, at A1).

<sup>4</sup> Jelliff, 76 Alb. L. Rev. at 337.

<sup>5</sup> The Oyez Project, supra note 2.

<sup>6</sup> Id.

<sup>7</sup> Justice Anthony Kennedy, The Justice of the United States Supreme Court, U.S. Supreme Court Case Tracker: Supreme Court Review, Updates on Our Nation's Highest Court, <http://www.http://supremecourtreview.com/default/justice/index/id/34> (last visited Oct. 15, 2014) (hereinafter "Supreme Court Review").

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. (quoting Justice Kennedy: "They made up a job for me at the state legislature. I was the only page boy the State Senate ever had. I was the page boy there for a number of years...I started in the fourth grade and did it through the eighth grade, so I was this young, little kid. It

Kennedy also spent some of his childhood summers working in the oil fields, a job he credits for teaching him more about life than his page-boy job.<sup>11</sup>

Justice Kennedy's formal education began at a local public high school in Sacramento, California.<sup>12</sup> After his high school graduation, Justice Kennedy attended Stanford University and spent a year of his studies at the London School of Economics.<sup>13</sup> He earned both his A.B. and Phi Beta Kappa key in 1958.<sup>14</sup> Like many of the justices on the U.S. Supreme Court today, Justice Kennedy attended Harvard Law School and graduated *cum laude* in his distinguished law school class.<sup>15</sup> Following graduation from Harvard Law School, he worked as an associate for a law firm in San Francisco, California.<sup>16</sup> In 1963, Justice Kennedy's father died unexpectedly.<sup>17</sup> Justice Kennedy decided to move back to Sacramento to take over his father's business; this decisive move became a personal and professional decision that shaped the rest of his life.<sup>18</sup> That same

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probably stunted my growth because of all the cigar smoke they had in those days. As a result, I knew Earl Warren very well, on a somewhat professional basis. Professional, as in I was a nine-year-old page boy and he was the Governor. We knew his children and played in the Governor's Mansion and so forth. I have a letter I've given to the Supreme Court Historical Society, in which he wrote and said 'You're going to go very far in government.' I'm very proud of the fact that I knew well someone who later became the Chief Justice of the United States.").

<sup>11</sup> Id. (quoting Justice Kennedy: "I got jobs in the oil fields. My uncle was in the oil business, and so at the age of I think 14, I got my first job kind of cleaning up around the oil rig. And then, I learned how to do that, and I went to Montana, Canada, New Orleans. I worked on a drilling barge in the Gulf in the summer. You could make a lot of money in those days, by the standards of those days, in the oil fields, and so I saved that to help for my education, and I loved it. I think I maybe learned more in the oil fields than I did in the State Senate. I think there's a lot of wisdom in the working man and the working woman. I think they're very concerned about what the country is like, what their life should be like. And I think that taught me a lot, because I was the butt of many jokes when I was a little kid working with these high-powered people in the oil fields, and I had to learn to adjust to that and try to pull my own weight.").

<sup>12</sup> The Oyez Project, supra note 2.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

year, Justice Kennedy married Mary Davis, a childhood friend with a Masters in Education from Stanford University and a teacher and librarian in the Sacramento public school system.<sup>19</sup> The two later had three children together.<sup>20</sup>

Once back in Sacramento, Justice Kennedy quickly stepped into his father's business and political network of connections and contacts.<sup>21</sup> The California legal and political community realized that the young attorney had as much, if not more, promise and talent than his well-respected father.<sup>22</sup> Justice Kennedy grew into "a talent for socializing" and quickly made influential friends among the state politicians.<sup>23</sup> One friend, Ed Meese, represented the California District Attorney Association in the mid-1960's and then worked alongside California Governor Ronald Reagan.<sup>24</sup> Because of Mr. Meese and Justice Kennedy's similar age and up-brining, the two struck a friendship and never lost touch with each other throughout their lives.<sup>25</sup> In 1973, Justice Kennedy was recruited by Mr. Meese and the Reagan Gubernatorial Administration to draft a constitutional amendment that would cut taxes and spending for the State of California.<sup>26</sup> The amendment was not approved by the California voters, but did lay the foundation for a similar proposal that was later adopted.<sup>27</sup>

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<sup>19</sup> Supreme Court Review, supra note 7.

<sup>20</sup> The Oyez Project, supra note 2.

<sup>21</sup> Jelliff, 76 Alb. L. Rev. at 337-38.

<sup>22</sup> The Oyez Project, supra note 2.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id. ("Meese left to work for then-Governor Reagan in 1966 and Kennedy continued his work as an attorney and lobbyist. The two men did not lose touch with each other, however, and Kennedy continued to help Meese and Reagan in small capacities.").

<sup>26</sup> Id.; Jelliff, 76 Alb. L. Rev. at 338.

<sup>27</sup> Jelliff, 76 Alb. L. Rev. at 338.

Not too long after, Governor Reagan recommended Justice Kennedy to fill a vacancy on the U.S. Court of Appeals for the Ninth Circuit.<sup>28</sup> This recommendation was likely because the Governor was impressed with Justice Kennedy's work on the state constitutional amendment.<sup>29</sup> President Gerald Ford agreed with the recommendation and Justice Kennedy joined the Ninth Circuit in 1975 "as the youngest federal judge of his day."<sup>30</sup> The Carter Administration appointed a sweeping number of liberal judges to various courts, which helped to form Justice Kennedy's reputation as "the head of a conservative minority in the Court of Appeals."<sup>31</sup> However, Justice Kennedy was commended early in his judgeship by liberals for his "method of addressing each issue in a narrow case-by-case manner."<sup>32</sup>

It is also worth mentioning that while still working in private practice and throughout his judicial career, Justice Kennedy was also Professor Kennedy - he held a position as professor at McGeorge School of Law of the University of the Pacific.<sup>33</sup> Justice Kennedy taught Constitutional Law and held this position with great pride until he took his seat on the U.S. Supreme Court.<sup>34</sup>

Justice Kennedy's ascent to the U.S. Supreme Court started on June 26, 1987, the day Justice Lewis Powell resigned from the Court.<sup>35</sup> President Ronald Reagan promptly nominated Robert Bork to fill the position.<sup>36</sup> Mr. Bork was "an ornery intellectual, with a scraggily beard and

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.; The Oyez Project, supra note 2. At this time, Justice Kennedy was around thirty-nine years old.

<sup>31</sup> Jelliff, 76 Alb. L. Rev. at 338.

<sup>32</sup> Id.

<sup>33</sup> Id. at 338.

<sup>34</sup> Id. at 338. See also Symposium, The Evolution of Justice Anthony M. Kennedy's Jurisprudence - Introduction, 44 McGeorge L. Rev. iii (2013).

<sup>35</sup> Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court, 22 (First Anchor Books Edition 2007). It is interesting to note that Justice Powell was considered the "swing justice of his day" and the fifth vote for the majority in some controversial cases. See id.

<sup>36</sup> Id.

without any natural ethnic or religious political base. For Democrats, in short, he was an inviting target.<sup>37</sup> Moderate Democrats in the South had issue with what their constituents considered as Mr. Bork's "cultural conservatism."<sup>38</sup> Because of the heated political confirmation process, Mr. Bork lost the Senate confirmation by a vote of 58 to 42.<sup>39</sup> President Reagan was enraged by the Democrats in the Senate and vowed to nominate someone even more objectionable than the last.<sup>40</sup> His second pick was Douglas H. Ginsburg, a Reagan-appointed D.C. Circuit judge that was a younger, more conservative nominee than Robert Bork.<sup>41</sup> However, President Reagan's strategy quickly folded when it was revealed "that the law-and-order judge had smoked marijuana as a professor at Harvard Law School."<sup>42</sup>

At this point, Howard Baker, President Reagan's White House Chief of Staff, "just wanted to pick someone who would be confirmed—a conservative, to be sure, but not necessarily someone who would please [Mr.] Meese [now at the Department of Justice for the Reagan Administration and still Justice Kennedy's close friend] and other true believers" of a strong conservative agenda.<sup>43</sup> Judge Anthony M. Kennedy of the U.S. Court of Appeals for the Ninth Circuit was chosen as the next nominee — perhaps because he was known to be a conservative judge in the Ninth Circuit, but also admired by liberals for his "pragmatic decision-making" abilities.<sup>44</sup> Justice Kennedy passed Senate confirmation with little resistance on February 3, 1988.<sup>45</sup> Justice

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<sup>37</sup> Id.

<sup>38</sup> Perhaps a polite way of saying that Mr. Bork sounded like a racist.

<sup>39</sup> Id. at 23.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Supreme Court Review, supra note 7.

<sup>45</sup> Id.; The Oyez Project, supra note 2; Jelliff, 76 Alb. L. Rev. at 388-89.



Kennedy's first day as an Associate Justice of the U.S. Supreme Court was February 18, 1988.<sup>46</sup> Today, Justice Kennedy sits in the third-most coveted seat<sup>47</sup> on the U.S. Supreme Court - to Chief Justice Roberts' left-hand side as the second most senior justice.<sup>48</sup>

## **II. The Doctrine of *Stare Decisis* and Justice Kennedy's Jurisprudence**

Many legal scholars have questioned the role precedent plays in the minds of the justices of the U.S. Supreme Court. However, the word "precedent" needs to be parsed out to begin the discussion on Justice Kennedy's use of the doctrine of *stare decisis*. Then, a background understanding of Justice Kennedy's general jurisprudence best provides a backdrop for his authored cases in which he specifically addresses *stare decisis*.

### **A. The Doctrine of *Stare Decisis***

"Precedent" is a broad term, used to include both vertical precedent and horizontal precedent.<sup>49</sup> Vertical precedent is "the obligation of a lower court to follow the rulings of a higher court in its own chain of command."<sup>50</sup> Horizontal precedent tends to be not so absolute and is the "obligation of a court to follow its own previous decisions."<sup>51</sup> Because the U.S. Supreme Court is the highest and final court in the United States, a discussion of vertical precedent is not as vibrant as a discussion of horizontal precedent.<sup>52</sup> When referencing the Supreme Court's use of previous

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<sup>46</sup> Jelliff, 76 Alb. L. Rev. at 389.

<sup>47</sup> I assume that the first most coveted seat would be that of Chief Justice Roberts, the second seat being that of Justice Scalia, who the first most senior member of the Court and seated to the Chief Justice's right-hand side.

<sup>48</sup> Supreme Court Review, *supra* note 7.

<sup>49</sup> Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 Ga. St. U. L. Rev. 381, 385 (2007).

<sup>50</sup> *Id.* (internal quotations omitted).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

decisions, a type of horizontal precedent is called “*stare decisis*,” law Latin for “stand by the thing decided.”<sup>53</sup>

Generally speaking, *stare decisis* is understood as a doctrine that addresses “the judicial policy of (sometimes) adhering to a prior decision irrespective of the prior decision’s legal correctness according to other interpretive criteria.”<sup>54</sup> The judicial doctrine’s central understanding distinguishes it from precedent. Precedent serves “the more modest role of providing relevant interpretive information...or...a starting point or baseline against which a departure ought to be justified or explained.”<sup>55</sup> *Stare decisis*, on the other hand, is more than following in the same reasoning and conclusions as other cases.<sup>56</sup> It “is a doctrine about the judicial policy or practice of adhering, sometimes, to a decision a court would otherwise feel fully justified in concluding was legally wrong.”<sup>57</sup> Ultimately, *stare decisis* is a judicial doctrine that helps to ensure the legal consistency of the Court.

As strong (or as weak) as the doctrine of *stare decisis* may be, it is neither constitutionally required nor absolute in American jurisprudence.<sup>58</sup> Article III of the U.S. Constitution does not require the adherence to precedent, outline when departure from precedent is or is not allowed, or grant powers to the Court to establish binding rules in prior cases that it must follow in subsequent cases.<sup>59</sup> And even as a policy in which the Court subscribes, *stare decisis* is a flexible policy that

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<sup>53</sup> Id.

<sup>54</sup> Michael Stokes Paulsen, Does the Supreme Court’s Current Doctrine of *Stare Decisis* Require Adherence to the Supreme Court’s Current Doctrine of *Stare Decisis*?, 86 N.C. L. Rev. 1165, 1171 (2008).

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id. at 1169-71.

<sup>59</sup> Id.

no one justice seems to strictly apply.<sup>60</sup> Yet, the presence of *stare decisis* in some of the Supreme Court's most controversial decisions is noteworthy and worth discussion.<sup>61</sup>

## B. Justice Kennedy's Jurisprudence

To be blunt, a categorization of Justice Kennedy's jurisprudence escapes all. I cannot help but equate the search for his jurisprudential approach with the search for Malaysia Air Flight 370. Sometimes called "rudderless and unpredictable,"<sup>62</sup> "a sphinx"<sup>63</sup> "who trims his jurisprudential sails to what he perceives to be the prevailing political winds"<sup>64</sup> or a "sweet mystery"<sup>65</sup> and "a *sui generis* enigma at the heart of the modern Supreme Court."<sup>66</sup> Further, he has been labeled as a

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<sup>60</sup> *Id.* at 1170 (quoting Agostini v. Felton, 521 U.S. 203, 235-36 (1997) (collecting cases and stating that adherence to precedent is "not an inexorable command" but "a policy judgment")).

<sup>61</sup> This paper only highlights Justice Kennedy's use of constitutional *stare decisis* and not statutory interpretation *stare decisis*. For a more complete discussion of statutory interpretation *stare decisis*, see i.e. Leegan Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877, 899-901 (2007) (Kennedy, J., majority); Hohn v. United States, 524 U.S. 236, 251-53 (1998) (Kennedy, J., majority); Patterson v. McLean Credit Union, 491 U.S. 164, 172-75 (1989) (Kennedy, J., majority). See generally Sydney Foster, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 Geo. L.J. 1863 (2008).

<sup>62</sup> Jelliff, 76 Alb. L. Rev. at 336 (citing Richard C. Reuben, Man in the Middle, Cal. Law., Oct. 1992, at 36).

<sup>63</sup> Jelliff, 76 Alb. L. Rev. at 336 (citing Garrett Epps & Dahlia Lithwick, Will the Real Anthony Kennedy Please Stand Up?, Slate.com (Apr. 27, 2007, 6:01 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/04/the\\_sphinx\\_of\\_sacramento.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/the_sphinx_of_sacramento.html)).

<sup>64</sup> Jelliff, 76 Alb. L. Rev. at 336 (citing Michael Stokes Paulsen, The Many Faces of "Judicial Restraint", 1993 Pub. Int. L. Rev. 3, 17 (1993)).

<sup>65</sup> Ilya Shaprio, A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy, 33 Harv. J.L. & Pub. Pol'y 333, 360 (2009) (reviewing Helen J. Knowles, The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty, Rowman & Littlefield (2009)). This description of Justice Kennedy is taken from an famous paragraph found in the Justice's majority opinion in Planned Parenthood Se. Pa. v. Casey, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compassion of the State." Casey, 505 U.S. at 851. For criticism on the "sweet mystery of life" passage, see e.g. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J. dissenting) (characterizing the passage in Casey as "the passage that ate the rule of law").

<sup>66</sup> Shapiro, 33 Harv. J.L. & Pub. Pol'y at 360.

“constant struggle.”<sup>67</sup> Others suggest that he “does produce the type of standard-less decisions that some would label inconsistent.”<sup>68</sup> No one is able to come close to pigeon-holing Justice Kennedy. “Justice Kennedy is famously frustrating, pleasing some of the people all of the time and thus often facing the wrath of those on the short end of one of his deciding 5-4 votes.”<sup>69</sup>

In an attempt to articulate any type of jurisprudential approach for Justice Kennedy, some scholars focused on his jurisprudence in more political terms, while another scholar recognized the Roman Catholic influences that are found throughout his jurisprudence.<sup>70</sup> However, these types of approaches are not coherent, considering Justice Kennedy’s stance on abortion in Planned Parenthood Se. Pa. v. Casey, decided while a republican was president.<sup>71</sup> One scholar tried to focus on Justice Kennedy’s libertarian vibes found in his authored opinions on freedom of speech, equal protection for sexual minorities, strict scrutiny for racial classifications, and (possibly) abortion, while another scholar responded to this theory with Justice Kennedy’s rather un-libertarian emphasis in areas such as criminal law, property rights, and governmental powers.<sup>72</sup> Other scholars contrasted the Justice Kennedy’s ideology of the U.S. Constitution with other more staunch, stubborn members of the Court, but have only produced a perplexing understanding that is neither fully new-originalist nor truly living-constitutionalist.<sup>73</sup> There are “weaknesses inherent

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<sup>67</sup> Id. at 354.

<sup>68</sup> Id. at 354.

<sup>69</sup> Id. at 351.

<sup>70</sup> Jelliff, 76 Alb. L. Rev. at 336

<sup>71</sup> Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833 (1992). Republican George H.W. Bush was president at this time.

<sup>72</sup> See generally Ilya Shaprio, A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy, 33 Harv. J.L. & Pub. Pol’y 333 (reviewing Helen J. Knowles, The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty, Rowman & Littlefield (2009)).

<sup>73</sup> Shapiro, 33 Harv. J.L. & Pub. Pol’y at 337 (“While ‘the intentions and the purpose of the framers should prevail,’ accepting ‘that new generation yield new insights and new perspectives does not mean the Constitution changes. It just means that our understanding of it changes.’”) (citing Helen J. Knowles, The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty (2009) (quoting Hearings on the Nomination of Anthony M. Kennedy to be Associate Justice of

in any unifying theory of Justice Kennedy<sup>74</sup> and, quite simply, Justice Kennedy's jurisprudence has failed everyone's attempt at categorization.<sup>75</sup>

Yet the best description and understanding of Justice Kennedy is the simplest one: moderate.<sup>76</sup> He is the "swing vote,"<sup>77</sup> a "remaining centrist,"<sup>78</sup> and "an important pivot on which close decisions turn."<sup>79</sup> Simply, Justice Kennedy is a middle man. I wonder if his childhood exposure to both upperclass, conservative politics and blue-collar, union workers crafted him to be sympathetic to both political camps and the legal doctrines each side is likely to utilize.<sup>80</sup> I also wonder whether his narrow approach of moving individual case by individual case prevents him from crafting a single, coherent jurisprudential approach.<sup>81</sup> I further wonder whether Justice Kennedy's replacement of another swing voter, Justice Powell, on the U.S. Supreme Court encouraged him to be more open in his thoughts on how to craft law and policy.<sup>82</sup> However, all these considerations are not fully gratifying and I am constantly left wondering about Justice Kennedy's jurisprudence. Even with the most recent changes to the composition of the Court, "it is unlikely that Justice Kennedy will shift from his role as the deciding vote in most controversial cases."<sup>83</sup> This is the only understanding of Justice Kennedy that seems to be consistent.

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the Supreme Court of the United States Before the S. Comm. on the Judiciary, 100th Cong. 154 (1987)). See generally Lisa K. Parshall, Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away from a Conservative Methodology of Constitutional Interpretation, 30 N.C. Cent. L. Rev. 25 (2007).

<sup>74</sup> Shapiro, 33 Harv. J.L. & Pub. Pol'y at 353

<sup>75</sup> Id. at 353.

<sup>76</sup> Supreme Court Review, supra note 7.

<sup>77</sup> Id.

<sup>78</sup> Lisa K. Parshall, Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away from a Conservative Methodology of Constitutional Interpretation, 30 N.C. Cent. L. Rev. 25, 25 (2007).

<sup>79</sup> The Oyez Project, supra note 2.

<sup>80</sup> See supra text accompanying note 11, note 31.

<sup>81</sup> See supra text accompanying note 31.

<sup>82</sup> See supra text accompanying note 35.

<sup>83</sup> Shapiro, 33 Harv. J.L. & Pub. Pol'y at 360.

### **III. Justice Kennedy's Cases on *Stare Decisis***

The decisions that Justice Kennedy penned best demonstrate his views on the doctrine of *stare decisis*. Starting with a plurality opinion in which he had a strong hand in crafting, Justice Kennedy attempts to follow a strong *stare decisis* doctrine in constitutional cases. However, the placement of a particular exception to his *stare decisis* understanding provides Justice Kennedy with an opportunity to not follow precedent when he disputes fundamental points of constitutional principles. Justice Kennedy's *stare decisis* exception allows him to dispute the correctness of the previous opinion and, in turn, not follow *stare decisis* neither in practice nor principle. This not only adds to Justice Kennedy's rather perplexing jurisprudential approach, but also provides him with an opportunity to substantially effect future controversial constitutional cases as the Court's middle-man.

#### **A. Attempts at a Strong Foundation for *Stare Decisis***

Justice Kennedy attempts to follow a strong doctrine of *stare decisis*. His articulation of the strength of the judicial doctrine and his adherence to the Court's previously announced reasoning, despite sharp criticism, are commendable. However, Justice Kennedy's strong statements on *stare decisis* are found in one case that reworks a precedent's underlying constitutional framework and another case that overrules precedent. These considerations coupled with later modifications to one constitutional framework raise red flags as to Justice Kennedy's earnest efforts to adhere to a strong doctrine of *stare decisis*.

Justice Kennedy's role in the plurality decision in Planned Parenthood of Se. Pa. v. Casey<sup>84</sup> shows a strong, coherent articulation of *stare decisis* and its doctrinal foundation. This case has been dubbed "somewhat surprisingly, the Supreme Court's first systematic attempt to set forth a general theory of the role of precedent and *stare decisis* in constitutional adjudication."<sup>85</sup> In Casey, five abortion clinics and an individual physician representing a class of physicians asked the Court to hold five provisions of the Pennsylvania Abortion Control Act as facially unconstitutional, while Pennsylvania, the United States and other *amici curiae* wanted the Court to overrule Roe v. Wade<sup>86</sup> in holding the Pennsylvania statute constitutional.<sup>87</sup> Justices O'Connor, Kennedy, and Souter announced the plurality decision of the Court that the essential holding of Roe would remain intact, thereby upholding two provisions of the Pennsylvania Abortion Control Act and finding three provisions unconstitutional with Casey's announced undue burden framework.<sup>88</sup>

In discussing *stare decisis* and Roe, the plurality opinion noted the unique position in which the Casey Court was placed in our Nation's legal system.<sup>89</sup> Although *stare decisis* would not be an "inexorable command" applicable to every constitutional case, the Court would reexamine a prior ruling with an eye towards "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."<sup>90</sup> In particular, the Court would ask itself four core questions in deciding whether to overturn a previous ruling:

whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance

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<sup>84</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

<sup>85</sup> Paulsen, 86 N.C. L. Rev. at 1168-69 (internal quotations omitted).

<sup>86</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>87</sup> Casey, 505 U.S. at 844-45.

<sup>88</sup> Id. at 845-46, 877.

<sup>89</sup> Id. at 854.

<sup>90</sup> Id. (internal quotations and citations omitted).

that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.<sup>91</sup>

Going through each consideration articulated above and noting both the central importance of Roe and its evolved factual underpinnings, the Court determined that the crux of its previous decision would remain.<sup>92</sup>

Past the announced rules of how a prior decision may be overturned, three doctrinal foundations of *stare decisis* are revealed in Casey — the extensive discussion of each shows its importance to Justice Kennedy’s view of *stare decisis*. The plurality addressed two undercurrents simultaneously: maintaining the legitimacy of the Court and respecting the rule of law. In a portion of its decision that contrasts its current position to that of the Court’s previous positions in West Coast Hotel Co. v. Parrish<sup>93</sup> and Brown v. Bd. of Educ.,<sup>94</sup> the Court noted the importance of grounding its decisions in well reasoned principles and “on the terms the Court claims for them...[and] not as compromises with social and political pressures[.]”<sup>95</sup> If the Court were to continually overrule itself, the country would no longer believe in the Court’s good faith attempts to seek the right answers, thereby showing that the Court neither has good faith nor the right answers.<sup>96</sup> Further, the Court’s short term political appeasements through overruling prior

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<sup>91</sup> Id. at 854-55.

<sup>92</sup> Id. at 855-64.

<sup>93</sup> West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (ending the eroded principles founded in Lochner v. New York, 198 U.S. 45 (1905) and Adkins v. Children’s Hospital of District of Columbia, 261 U.S. 525 (1923) that favored the theory of laissez-faire and liberty of contract over social regulation).

<sup>94</sup> Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Brown I) (stopping the country’s continual wave of racial segregation, as first judicially recognized in Plessy v. Ferguson, 163 U.S. 537 (1896)).

<sup>95</sup> Casey, 505 U.S. at 865-66.

<sup>96</sup> Id. at 866.



decisions shows great disrespect for the rule of law.<sup>97</sup> A justice may be subject to personal attacks for an unpopular decision, but:

[t]o all those who will be so tested by following [the rule of law], the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once again, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not change so fundamentally as to render the commitment obsolete.<sup>98</sup>

If the court were to “address error, if error there was, [it would come] at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”<sup>99</sup>

The third undercurrent — the role of correctness — cannot go unnoticed in Casey. Remember, the doctrine of *stare decisis* is supposed to, at least in theory, follow a previous decision regardless of its correctness. Yet in Casey, the Court discussed Griswold v. Connecticut,<sup>100</sup> Eisenstadt v. Baird,<sup>101</sup> and Carey v. Population Servs. Int’l,<sup>102</sup> and the protections those cases afford to privacy, women’s liberty, and personal decisions about procreation.<sup>103</sup> Although “reasonable people will have differences of opinion about these matters,” these cases represent “intimate views with infinite variations, and their deep, personal character underlying our [previous] decisions” must be respected.<sup>104</sup> “We have no doubt as to the correctness of those decisions.”<sup>105</sup> Because Roe followed those decisions by affording similar protections for personal

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<sup>97</sup> Id. at 866-68.

<sup>98</sup> Id. at 868.

<sup>99</sup> Id. at 869.

<sup>100</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>101</sup> Eisenstadt v. Baird, 405 U.S. 438 (1972).

<sup>102</sup> Carey v. Population Servs. Int’l, 431 U.S. 678 (1977).

<sup>103</sup> Casey, 505 U.S. at 851-54.

<sup>104</sup> Id. at 853.

<sup>105</sup> Id. at 852.

liberties and through borrowed reasoning, the plurality implicitly stated that the core of Roe was also correctly decided and would remain the law.<sup>106</sup>

The strong statements about *stare decisis* in Casey are telling of how Justice Kennedy views the importance of *stare decisis* in judicial analysis in controversial constitutional cases. Four strict and succinct questions will mark whether the Court will overturn a previous decision, and those four questions will be aided by a profound respect for maintaining judicial legitimacy and the rule of law. Pages are spent in Casey on the importance of these aspects in Supreme Court decision making. In theory, the Court would consider the practical effects of the principle previously announced. However, the correctness of the underlying constitutional principle cannot completely be ignored when revisiting a controversial Supreme Court decision.

The same understanding of *stare decisis* was echoed in Justice Kennedy's opinion in Lawrence v. Texas.<sup>107</sup> In Lawrence, the Court was asked to decide whether a Texas statute that criminalized "homosexual conduct" violated two different portions of the Fourteenth Amendment and whether Bowers v. Hardwick<sup>108</sup> should be overturned.<sup>109</sup> Justice Kennedy authored the majority opinion that held that the Texas statute was unconstitutional and that Bowers should be overturned.<sup>110</sup> Justice Kennedy followed the same *stare decisis* analysis as in Casey to determine that Bowers was no longer good law.<sup>111</sup> In fact, Justice Kennedy cited to Casey to demonstrate how Bowers was no longer valid and why *stare decisis* could not save the bad precedent.<sup>112</sup> Justice

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<sup>106</sup> Id. at 853.

<sup>107</sup> Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>108</sup> Bowers v. Hardwick, 478 U.S. 186 (1986).

<sup>109</sup> Lawrence, 539 U.S. at 564.

<sup>110</sup> Id. at 577-78.

<sup>111</sup> Id.

<sup>112</sup> Id. at 577 ("In Casey we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that

Kennedy was consistent in his analysis of *stare decisis* in both Casey and Lawrence. Like Casey, the lengthy discussion of precedent's fallacies in Lawrence is noteworthy.<sup>113</sup> Yet different than Casey, Justice Kennedy determined in Lawrence that precedent found in "Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."<sup>114</sup>

Despite the strong articulation of *stare decisis* in Casey, the role of correctness in Casey and Lawrence raise serious doubt as to Justice Kennedy's strict adherence to a strong judicial doctrine of consistency. Justice Kennedy's further modifications of the undue burden framework in his later decisions on abortion further cast doubt on his attempt to follow a strong doctrine of *stare decisis*. Two later decisions on abortion discussed whether a state or the federal government can restrict the types of processes used by physicians to perform an abortion. Both cases provided Justice Kennedy with an opportunity to readdress the undue burden framework found in Casey. Justice Kennedy took the bait and capitalized on an opportunity to modify his previously announced constitutional principle, yet did so under the veil of adhering to *stare decisis*.

In Stenberg v. Carhart, Justice Kennedy found himself on the dissenting side of a split Court.<sup>115</sup> The majority held that it was unconstitutional for a Nebraska statute to criminalize partial birth abortions performed by physicians.<sup>116</sup> The majority opinion written by Justice Breyer picked up on a particular phrase in Casey and discussed the application of Nebraska's statute to two different types of partial birth abortion procedures.<sup>117</sup> The statute was unconstitutional because it

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liberty cautions with particular strength against reversing course.") (citing Casey, 505 U.S. at 855-56, 844).

<sup>113</sup> See id. at 564-73. See also id. at 573 (noting the "deficiencies in Bowers").

<sup>114</sup> Id. at 578.

<sup>115</sup> Stenberg v. Carhart, 530 U.S. 914 (2000).

<sup>116</sup> Id. at 929-30.

<sup>117</sup> Id. at 931-40. See id. at 930 (" 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except

lacked any exception for preserving the health of the mother and imposed an undue burden on the right of the mother to choose a partial birth abortion.<sup>118</sup>

Justice Kennedy dissented and was joined by the late Chief Justice Rehnquist.<sup>119</sup> Justice Kennedy read the statute to apply to only one type of partial birth abortion procedure.<sup>120</sup> He also read Casey to allow Nebraska and other states to weigh in on the abortion debate.<sup>121</sup> The majority opinion, in the eyes of Justice Kennedy, misunderstood precedent and did not afford the proper respect to the state's interests that Casey sought to protect in adjusting the Roe trimester framework.<sup>122</sup> Justice Kennedy took the position that if the statute applied to both types of partial birth abortions, then the inquiry should end; Nebraska should not also be required to provide a health exception.<sup>123</sup> Justice Kennedy ultimately determined that the state could rightfully restrict the types of procedures used to perform an abortion in respect for human life and its potential, and restricting such procedures does not unduly burden a woman the right to an abortion.<sup>124</sup>

In Gonzales v. Carhart, the Court was tasked with deciding whether a similar federal partial birth statute restricted a woman's right to an abortion.<sup>125</sup> Because the statute was more specific than the statute in Stenberg and better addressed the issues the Court had in Stenberg, Justice

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where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' ") (quoting Casey, 505 U.S. at 879 (quoting Roe, 410 U.S. 113, 164-65)).

<sup>118</sup> Id.

<sup>119</sup> Id. at 956.

<sup>120</sup> Id. at 960-64, 973-78.

<sup>121</sup> Id. at 961.

<sup>122</sup> Id. at 960-61.

<sup>123</sup> Id. (opining that Justice O'Connor went too far in her concurrence, when she required an exception to be written into the statute that would allow such procedures if the mother's health was at risk).

<sup>124</sup> Id. at 956-57.

<sup>125</sup> Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

Kennedy sided with the majority of the Court that found the statute constitutional.<sup>126</sup> Of particular importance, Justice Kennedy stated:

The principles set forth in the joint opinion in...[Casey] did not find support from all those who join the instant opinion. Whatever one's views concerning the Casey joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals [that found that the statute was unconstitutional for not having a medical exception, placed an undue burden on a woman's right to an abortion later in her pregnancy, and was void for vagueness].<sup>127</sup>

Justice Kennedy continued where he left off in Stenberg. He fleshed out the third prong of the undue burden framework, habitually citing to Casey and his opinion written in Stenberg to bolster his decision.<sup>128</sup> Specifically, Justice Kennedy read the statute to restrict only one type of abortion procedure, not two types of procedures.<sup>129</sup> Justice Kennedy and the majority found that in the face of medical uncertainty as to “whether the barred procedure is ever necessary to preserve a woman's health,” the legislature could properly determine that the procedure should not be used in situations to prevent a health risk to the woman.<sup>130</sup> Other alternative procedures were available in such situations.<sup>131</sup> The statute, in Justice Kennedy and the majority's view, did not impose an undue burden on a woman's right to an abortion.<sup>132</sup>

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<sup>126</sup> Id. at 168.

<sup>127</sup> Id. at 144-46.

<sup>128</sup> Id. at 145-67 (“[T]he state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.”) (quoting Casey, 505 U.S. at 846).

<sup>129</sup> Id. at 147-54.

<sup>130</sup> Id. at 161-67.

<sup>131</sup> Id. at 167.

<sup>132</sup> Id.

Admittedly, the holdings of Stenberg and Gonzales are hard to distinguished at first blush. However, Justice Kennedy's views in both cases are consistent. Taking a broader prospective on the two cases in the wake of Casey, Justice Kennedy was presented with an opportunity to again revisit the constitutional framework that would be applied to abortion cases. However, the crux of Justice Kennedy's opinion in both cases show that he is unwilling to substantially rework the analytical framework he previously crafted. This is unlike other justices who would completely overturn Roe and its foundational constitutional principles.<sup>133</sup> To Justice Kennedy, Stenberg and Gonzales closely mirror the tensions that were found in Casey: the difficult balance of the interests of the state in protecting life and potential life, and the privacy and familial interests inherent in a woman's right to choose an abortion. The unique nature of the partial birth cases offered Justice Kennedy a better means to highlight those complex tensions.

But in taking a more narrow prospective on the two cases, Justice Kennedy is modifying binding precedent and its underlying constitutional principles by allowing more attention to be drawn to the government's interests in abortion cases. What is most shocking about Stenberg and Gonzales is that Justice Kennedy attempts to operate under the veil of *stare decisis* in making this modification. Casey highlighted the aforementioned tensions, but Casey afforded both sides comparable latitude. Justice Kennedy's opinions in Stenberg and Gonzales evidence a more conservative reading of abortion precedent and a slow erosion of the undue burden framework. Yet, Justice Kennedy continually claimed that he was following Casey in his decisions in Stenberg and Gonzales. Perhaps the more conservative members of the Court persuaded Justice Kennedy to rethink his previous stance, or perhaps his desire for the correct constitutional principle overtook his *stare decisis* considerations. Regardless of the reason, Stenberg and Gonzales are evidence

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<sup>133</sup> See id. at 169 (J. Thomas, joined by J. Scalia, concurring).

that something other than a strong *stare decisis* doctrine is important to Justice Kennedy. The power behind the articulation of the *stare decisis* doctrine in Casey and Lawrence has dwindled to Justice Kennedy's mere attempt to somewhat follow precedent and accord *stare decisis* no great binding strength.

### **B. Justice Kennedy's Exception to *Stare Decisis***

Justice Kennedy's exception to *stare decisis* makes any of his attempts at adhering to the judicial doctrine of consistency seem feeble and insincere. His exception to *stare decisis* is best seen in Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1, and best exemplified in the cases leading up to and including Citizens United v. Fed. Election Comm'n. Justice Kennedy's exception to *stare decisis* allows him to not follow *stare decisis* when he disagrees in a non-majority opinion with an underlying constitutional principle. He is able to maintain this disagreement by continuing to author non-majority opinions, until a later case provides him with an opportunity to capitalize on his disagreement in a majority opinion. In his subsequent majority opinion, he is then able to overrule the cases with which he previously disagreed. Again, this shows that Justice Kennedy is not following *stare decisis* at any stage of his exceptional process.

Justice Kennedy's exception to *stare decisis* is succinctly stated in Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1.<sup>134</sup> Here, two public school districts voluntarily adopted a student assignment system that relied on race to determine which school certain children could attend.<sup>135</sup> The plurality opinion, written by Chief Justice Roberts, held that the school districts' actions could not withstand strict scrutiny absent a showing of *de jure* segregation.<sup>136</sup> Justice

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<sup>134</sup> Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

<sup>135</sup> Id. at 709.

<sup>136</sup> Id. at 748 ("For schools that never segregated on the basis of race...or that have removed vestiges of past segregation...the way to achieve a system of determining admission to the

Kennedy authored a concurring opinion in which he could neither fully agree with Chief Justice Roberts because of his treatment of the Equal Protection Clause, nor join in Justice Breyer's dissent because of his "misuse and mistaken interpretation of our precedents."<sup>137</sup> Of particular relevance, Justice Kennedy chastised the dissent for relying on concurring and dissenting opinions found in Gratz v. Bollinger<sup>138</sup> and Grutter v. Bollinger<sup>139</sup> to support the dissent's reasoning:

If today's dissent said it was adhering to the views expressed in the separate opinions in Gratz and Grutter, that would be understandable, and likely within the tradition — to be invoked, in my view, in rare instances — that permits us to maintain our own positions in the face of *stare decisis* when fundamental points of doctrine are at stake."<sup>140</sup>

Justice Kennedy continued to write that the majority opinions in Gratz and Grutter cannot be reconciled with the position of the dissent in Parents Involved.<sup>141</sup> Justice Kennedy would hold that the school districts should continue to be able to do the important work of bringing different types of students together, but should not do so based on racial classifications alone.<sup>142</sup>

Justice Kennedy authored a concurring opinion in Parents Involved that revealed his exception to *stare decisis*: a justice can cite or write a dissenting or concurring opinion in one case, follow that non-majority opinion in a subsequent case, and escape *stare decisis* altogether. A justice would not be bound to follow a majority opinion and could follow his own views on fundamental constitutional principles. By doing so, this justice would then not be adhering to the

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public school on a nonracial basis is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

<sup>137</sup> Id. at 782.

<sup>138</sup> Gratz v. Bollinger, 539 U.S. 244 (2003).

<sup>139</sup> Grutter v. Bollinger, 539 U.S. 306 (2003).

<sup>140</sup> Parents Involved, 551 U.S. at 792.

<sup>141</sup> Id.

<sup>142</sup> Id. at 789, 798.



doctrine of *stare decisis* at all. *Stare decisis* would be an afterthought in a justice's personal crusade for the correct constitutional principle in which he agrees.

It is not surprising that the Supreme Court retains a tradition of maintaining one's opinion through dissenting or concurring opinions. After all, the point of authoring non-majority opinions is to dispute the other justices' reasonings. However, the impact of of this practice for Justice Kennedy, the swing-vote on today's Court, is profound. The best example of the impact of his *stare decisis* exception is Citizens United v. Fed. Election Comm'n and its predecessors, Austin v. Mich. State Chambers of Commerce and McConnell v. Fed. Election Comm'n.

In Austin v. Mich. State Chambers of Commerce, the Court considered whether a section in the Michigan Campaign Finance Act violated the First or the Fourteenth Amendments because of its restrictions on corporate expenditures from general treasury funds for use in political campaigns.<sup>143</sup> The majority opinion, delivered by Justice Marshall, held that the state statute was constitutional because the provision was narrowly tailored to serve a compelling state interest of preventing financial quid pro quo<sup>144</sup> and "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public's support for the corporation's political ideas."<sup>145</sup> The majority opinion loosely cited to Buckley v. Valeo<sup>146</sup> and First Nat'l Bank of Boston v. Bellotti<sup>147</sup> for the aforementioned constitutional principles.<sup>148</sup>

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<sup>143</sup> Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 654-55 (1990).

<sup>144</sup> "Financial quid pro quo" means that a donor could give money to a campaign with the explicit or implicit understanding that the donor would receive some sort of "kick back" or reward from the candidate in the future.

<sup>145</sup> Id. at 655, 660.

<sup>146</sup> Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*).

<sup>147</sup> First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

<sup>148</sup> See generally Austin, 494 U.S. at 655-69 (J. Marshall, majority, citing Buckley approximately three times and Bellotti approximately four times).

Justice Kennedy dissented, joined by Justices O'Connor and Scalia, and argued that the majority opinion not only allowed an unconstitutional content based restriction on a corporation's right to speech, but egregiously upheld "a direct restriction on the independent expenditure of funds for political speech for the first time in history."<sup>149</sup> Justice Kennedy substantially relied on Buckley and Bellotti, cases he considered more than persuasive precedent, when he opined that neither the state nor the majority could properly explain how such a restriction furthers a compelling government interest when the Court has continuously rejected the argument that independent expenditures do not foster political corruption.<sup>150</sup> Further, the First Amendment seeks to protect speech, not allow restrictions based on the identity of the speaker and its financial abilities.<sup>151</sup> It is natural, and in fact encouraged in our Constitution, for people to pool their ideas and voices to form one association or organization.<sup>152</sup> Simply stated, "associations do not suddenly present the specter of corruption merely by assuming the corporate form."<sup>153</sup> Justice Kennedy and his fellow dissenters would hold that the Michigan statute was unconstitutional and remove the "unhappy paradox" the Court constructed when it comes to protecting political speech.<sup>154</sup>

In McConnell v. Fed. Election Comm'n, the Court was asked to decide whether provisions of the Bipartisan Campaign Reform Act of 2002 (BRCA), a federal statute that was crafted to

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<sup>149</sup> Austin, 494 U.S. at 695.

<sup>150</sup> Id. at 702-05. See generally id. at 695-713 (J. Kennedy, dissenting, citing Buckley approximately eight times and Bellotti approximately seven times).

<sup>151</sup> Austin, 494 U.S. at 699, 704-06.

<sup>152</sup> Id. at 709-13.

<sup>153</sup> Id. at 713 (internal quotations and citations omitted).

<sup>154</sup> Id. at 713 ("It is an unhappy paradox that this Court, which has the role of protecting speech and of barring censorship from all aspects of political life now becomes itself the censor. In the course of doing so, the Court reveals a lack of concern for speech rights that have the full protection of the First Amendment. I would affirm the judgment [that the state statute is unconstitutional].") (internal citations omitted).

better combat new electioneering improprieties, were constitutional under the First Amendment.<sup>155</sup> The complex opinion was announced by several members of the Court and spanned three different authored sections, but followed in the same reasoning of Austin in upholding restrictions on corporations' independent expenditures to political campaigns.<sup>156</sup> Justice Kennedy continued to disagree with the reasoning and holding of Austin in his concurring in part and dissenting in part opinion: "In the end the majority can supply no principled basis to reason away Austin's anomaly. Austin's errors stand exposed, and it is our duty to say so."<sup>157</sup> Once again substantially relying on Buckley and Bellotti, Justice Kennedy iterated that financial quid pro quo was not a governmental concern that justified the restrictions placed on corporations.<sup>158</sup> Further, even the appearance of the potential for financial quid pro quo was not a compelling government interest that further justified the restriction.<sup>159</sup> Justice Kennedy did not follow in Austin's footsteps in his non-majority opinion in McConnell when he stated that: "The Court, upholding multiple laws that suppress both spontaneous and concerted speech, leaves us less free than before. Today's decision breaks faith with our tradition of robust and unfettered debate."<sup>160</sup>

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<sup>155</sup> See McConnell v. Fed. Election Comm'n, 540 U.S. 93, 122 (2003) (noting the "increased importance of soft money, the proliferation of issue ads, and the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections") (internal quotations omitted).

<sup>156</sup> Id. at 114. See id. at 263 ("The federal election campaign laws, which are already (as today's opinions show) so voluminous, so detailed, so complex, that no ordinary citizen dare run for office, or even contribute a significant sum, without hiring an expert adviser in the field, can be expected to grow more voluminous, more detailed, and more complex in the years to come—and always, always, with the objective of reducing the excessive amount of speech.").

<sup>157</sup> Id. at 325-29. The anomaly being that Bellotti and the First Amendment afford the rights of free speech to whatever the form of speaker and its financial abilities, and Austin took the opposite view without overruling Bellotti and Buckley. See id.

<sup>158</sup> Id.

<sup>159</sup> Id. at 329.

<sup>160</sup> Id. at 340-41.

An opportunity to right the Court's path came when Justice Kennedy wrote the majority opinion in Citizens United v. Fed. Election Comm'n.<sup>161</sup> The Court once again discussed the constitutionality of various portions of BCRA and the effects that Austin and McConnell had on corporate political speech.<sup>162</sup> Justice Kennedy and the majority held that:

Austin was a significant departure from ancient First Amendment Principles[... We] hold that *stare decisis* does not compel the continued acceptance of Austin. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.<sup>163</sup>

He next reviewed the flawed reasoning of Austin and McConnell: “The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents [Buckley and Bellotti] that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.”<sup>164</sup> Then, Justice Kennedy turned to the effect of *stare decisis* would have on the majority opinion in Citizens United:

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. Beyond workability, the relevant facts in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. We have also examined whether experience has pointed up the precedent's shortcomings.<sup>165</sup>

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<sup>161</sup> Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). The opportunity for Justice Kennedy to write the majority opinion in Citizens United could have easily come from his second-most senior position on the Court. See supra text accompanying note 46.

<sup>162</sup> Id. at 319.

<sup>163</sup> Id.

<sup>164</sup> Id. at 336.

<sup>165</sup> Id. at 362-63.

Most interesting is that Justice Kennedy did not cite to Casey in his analysis of *stare decisis*, but instead chose to rely on Payne v. Tennessee<sup>166</sup> for his *stare decisis* analysis.<sup>167</sup> He briefly went through each of the aforementioned *stare decisis* considerations to determine that:

Due consideration leads to this conclusion: Austin is now overruled. We return to the principle established in Buckley and Bellotti that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

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Given our conclusion we are further required to overrule the part of McConnell...[that] relied on the anti distortion interest recognized in Austin to uphold a greater restriction on speech than the restriction upheld in Austin, and we have found this interest unconvincing and insufficient. This part of McConnell is now overruled.<sup>168</sup>

After citing to his own opinion in McConnell, Justice Kennedy announced that the majority viewed the restrictions on corporate independent expenditures as unconstitutional and the disclaimer and disclosure requirements as constitutional.<sup>169</sup>

This line of First Amendment cases best shows the impact of Justice Kennedy's exception to *stare decisis*. Through two opinions in which he dissented and/or concurred, Justice Kennedy made his disagreement with a fundamental principle of constitutional law known. Where he disagreed with precedent once (Austin), Justice Kennedy disagreed with precedent again (McConnell) in a non-majority opinion and circumvented the doctrine of *stare decisis* (McConnell and Citizens United) by citing to his previous opinions. He could dispute the correctness of the

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<sup>166</sup> Payne v. Tennessee, 501 U.S. 808 (1991). It is interesting that this case predates Casey and its *stare decisis* analysis.

<sup>167</sup> Id.

<sup>168</sup> Id. at 363-66.

<sup>169</sup> Id. at 372.

previously announced constitutional principle and follow his own beliefs in the face of *stare decisis* in later opinions. To make matters worse, Justice Kennedy's subsequent majority opinion allowed him to overrule the cases in which he disagreed. Further, Justice Kennedy became the second most senior member on the Court at the time Citizens United was decided, thereby providing him with a more influential role in Supreme Court decision-making.<sup>170</sup> It is perhaps his newly acquired position of power coupled with his disagreement with precedent that made Justice Kennedy the perfect author for the majority opinion in Citizens United.

Also, the manner in which Justice Kennedy discussed *stare decisis* in Citizens United is noteworthy. His *stare decisis* methodology changed since Casey, and in fact, he never once cited to Casey during his analysis of *stare decisis* in Citizens United. Further, the Court overruled Austin and McConnell in a matter of a few paragraphs, as opposed to the multiple of pages spend discussing *stare decisis* in Casey. The two lengthy cases in which Justice Kennedy overruled in Citizens United certainly warranted more than a flippant discussion. Similar to Stenberg and Gonzales (and to a lesser extent, Casey and Lawrence), Justice Kennedy was driven to state the correct constitutional principle. It is perhaps because of the overwhelming strength of this drive seen in Citizens United that his strong attempts at adhering to *stare decisis* have eroded. Justice Kennedy's exception to *stare decisis* and its profound impact make his attempt to follow a strong judicial doctrine of consistency look very feeble and insincere.

### **C. The Future Impact of Justice Kennedy's Exception to *Stare Decisis***

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<sup>170</sup> See supra text accompanying note 46. As the second-most senior member of the Supreme Court, Justice Kennedy can decide who writes the opinion if Chief Justice Roberts and Justice Scalia do not agree with him.

Throughout an exploration into Justice Kennedy's approach to *stare decisis*, one must also consider his most notorious characteristic: his moderate, middleman position on today's Supreme Court. Citizens United provided him with an opportunity to decisively exercise his swing vote through use of his exception to *stare decisis*. Two areas of constitutional law give hint at the possibility of Justice Kennedy's use of his exception to *stare decisis* in future controversial cases. Justice Kennedy may ensure that more "famously frustrating"<sup>171</sup> 5-4 controversial cases are on our legal system's horizon. Future Supreme Court litigates would be wise to take note.

The first area relates to the First Amendment and Establishment Clause. In Cty. of Allegheny v. Amer. Civil Liberties Union Greater Pittsburgh Chapter, the Court decided whether two holiday displays, one a crèche and the other a menorah, placed outside local government buildings violated the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment.<sup>172</sup> Justice Blackmun announced the decision of the Court that the placement of the crèche was unconstitutional and the placement of the menorah was not unconstitutional through the three Lemon<sup>173</sup> tests coupled with more recent refinements of Lemon found in Lynch v. Donnelly.<sup>174</sup> Justice Kennedy authored an opinion that concurred in part and dissented in part.<sup>175</sup> Justice Kennedy first attacked Justice Blackmun's reliance on the three Lemon tests:

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<sup>171</sup> See supra text accompanying note 68.

<sup>172</sup> Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 587-88 (1989).

<sup>173</sup> So named from the tests' announcement in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). See Cty. of Allegheny, 492 U.S. at 592 (stating the Lemon tests as "a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion").

<sup>174</sup> Cty. of Allegheny, 492 U.S. at 579, 601-02, 620. Lynch v. Donnelly, 465 U.S. 668 (1984).

<sup>175</sup> Id. at 655.

I am content for present purposes to remain within the Lemon framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. Persuasive criticism of Lemon has emerged...Substantial revision of our Establishment Clause doctrine may be in order...<sup>176</sup>

Justice Kennedy found that both the crèche and the menorah are permissible displays in the context of the holiday season celebrations, even with use of the Lemon tests in a First Amendment Establishment Clause analysis.<sup>177</sup>

The second area relates to the Sixth Amendment. In Ring v. Arizona,<sup>178</sup> the Court discussed the continued applicability of Walton v. Arizona<sup>179</sup> in light of a more recent decision, Appendi v. New Jersey,<sup>180</sup> and whether an aggregating factor to impose a maximum criminal punishment may be found by a judge, or whether the Sixth Amendment requires a jury to decide if the aggregating factor exists.<sup>181</sup> The majority opinion held that in light of Appendi, Walton was no longer good law and that the jury must make a determination as to any aggregating factors before a court imposes a maximum criminal penalty.<sup>182</sup> Justice Kennedy concurred in Ring and voiced his disagreement with the ruling of Appendi. However, “Appendi is now the law, and its holding must be implemented in a principled way. As the Court suggests, no principled reading of Appendi would allow...[Walton] to stand.”<sup>183</sup> Although he cautioned as to the extension of Appendi, he acknowledged that Walton and Appendi could not co-exist.<sup>184</sup>

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<sup>176</sup> Id. at 655-56.

<sup>177</sup> Id.

<sup>178</sup> Ring v. Arizona, 536 U.S. 584 (2002).

<sup>179</sup> Walton v. Arizona, 497 U.S. 639 (1990).

<sup>180</sup> Appendi v. New Jersey, 530 U.S. 466 (2000). In Appendi, Justice Kennedy agreed with Justice O'Connor's dissent and did not author his own opinion.

<sup>181</sup> Ring, 536 U.S. at 597.

<sup>182</sup> Id. at 603,

<sup>183</sup> Id. at 613.

<sup>184</sup> Id.



Through these two cases, Justice Kennedy laid similar groundwork as found in Austin and McConnell. The only difference between Cty. of Allegheny / Ring and Austin / McConnell is that his tone in the former cases evidence a more subtle disagreement with binding precedent. However, it is disagreement nonetheless. He argued that the underlying constitutional principles in both cases, announced in Lemon for the First Amendment and Apprendi for the Sixth Amendment, are incorrect. His analysis to follow was an attempt to come to a resolution of the case, presenting a mixture of *stare decisis* adherence and use of his exception. And one must not forget that Justice Kennedy penned concurring opinions in both cases that allows him latitude to further utilize his exception to *stare decisis* in the future. Justice Kennedy, in fact, took some of this latitude in Town of Greece v. Galloway when he authored a majority opinion that partially abrogated Cty. of Allegheny.<sup>185</sup> Yet, sufficient foundation is laid in Cty. of Allegheny and Ring for more abrogation and overruling to come. Our legal system may soon see a decision similar to Citizens United in other areas of controversial constitutional law, particularly considering the great influence of Justice Kennedy's second-most senior position on the Supreme Court.<sup>186</sup>

### Conclusion

As stated in Marbury v. Madison,<sup>187</sup> it is for the Court to say what the law is. *Stare decisis* is a judicial doctrine that aims to consistently say what the law is, despite a particular justice's view of the correctness of the underlying constitutional principle. But in trying to succinctly answer whether Justice Kennedy follows *stare decisis*, I find myself in the confusing, perplexing

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<sup>185</sup> Town of Greece v. Galloway, 134 S.Ct. 1811, 1820-22 (2014).

<sup>186</sup> See supra text accompanying note 46, text accompanying note 169.

<sup>187</sup> Marbury v. Madison, 1 Cranch 137, 177 (1803).

world of Justice Kennedy's jurisprudence and am left without an answer. I, like many others, am famously frustrated by Justice Kennedy.

In sum, Justice Kennedy believes in a strong foundation for *stare decisis*. He attempts to adhere to a strong foundation of the judicial doctrine when deciding whether to overrule or follow binding precedent. But his exception to *stare decisis* allows him to escape *stare decisis* altogether. His exception makes it seem like he never had binding precedent in his way to a decision that he personally finds correct. Considering Justice Kennedy's influential role as the middleman on the Court and as the Court's second most senior member, it is very likely that he could continue to author concurring or dissenting opinions in other areas of constitutional law. This trend could occur until he finds an opportunity to author a majority opinion that overturns the decisions in which he disagrees, much like what Justice Kennedy did in Citizens United.

Once again, there is no fully gratifying, coherent theory to understanding Justice Kennedy. There is no quick and easy answer to Prof. Weing's questions and to the question of Justice Kennedy's jurisprudence, especially as it relates to *stare decisis*.